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Supreme Court of The United States

October Term, 1954

No. [redacted] 96

ESSO SHIPPING COMPANY
Petitioner

- against -

COMPANIA de MADERAS de CAIBARIEN, S.A.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner herein, Esso Shipping Company, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review a judgment of that Court.

OPINIONS BELOW

The opinion of the District Court (Eastern District of Louisiana) is contained in the record at page 527, and is contained herein as Appendix A, p. I. It is reported in 121 Fed. Supp. 280.

The opinion of the Court of Appeals is contained in the record at page 546, but has not yet been officially reported. It is contained herein as Appendix C, p. XI.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals was entered on March 17, 1955. Petition for a rehearing was denied, without opinion, on April 21, 1955.

The statutory provision conferring jurisdiction of the court to review is 28 USC § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are whether the Court of Appeals erred:

(1) In setting aside the findings and conclusions of the District Court without discussion and without assigning reasons or indicating any basis of disagreement — except as respects one of the six grounds assigned by the District Court — it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(2) In setting aside the findings and conclusions of the District Court which were not clearly erroneous.

(3) In holding, contrary to the decisions of all other Circuits, that a vessel which is admittedly guilty of multiple faults including statutory faults — that is, violations of mandatory statutes — may entirely escape all liability notwithstanding there is no showing or attempt to show that the faults did not contribute to the collision and notwithstanding the specific finding of the District Court that they did in fact materially contribute to the collision.

STATUTES INVOLVED

The statute which is involved is the Inland Rules of Navigation (33 USC 151, et seq.) but it does not appear that the meaning or interpretation of any of the Rules is at issue. Extracts from these rules are set out herein as Appendix D, p. XVI.

PROCEEDINGS IN THE COURTS BELOW

The case originated by libel and cross-libel respectively by the respondent as owner of the motor vessel STAR OF HONDURAS (hereinafter "STAR") and petitioner as owner of the tanker QUEENSTON HEIGHTS (hereinafter "QUEENSTON") for damages resulting from a collision of the vessels in the Mississippi River below New Orleans on the early morning of November 21, 1952.

The District Court held both vessels at fault contributing to the collision and entered a decree dividing the damages. The STAR appealed. No cross-appeal was filed by the QUEENSTON. The Court of Appeals modified and affirmed the decree, the modification being a reversal of so much of the decree as had held the STAR jointly responsible for the damages, this being the only issue presented.

The District Judge filed an opinion which fully reviewed and found the facts, and set out the faults of both vessels contributing to the collision. In view of the fact that one of the principal grounds of this application is the manner in which the Court of Appeals set aside and reversed all of the findings and conclusions as to the fault of the STAR, it is appropriate to mention here — to be developed more fully later — that not only was no error assigned by the STAR to any fact found by the District Court, but no error was assigned to the specific findings and conclusions that the STAR was at fault on six different grounds; the STAR'S assignments of error in this respect were directed solely to the finding that the STAR'S faults contributed to the collision. (See STAR'S assignments of error, Appendix B, p. X. The result was that in the Court of Appeals the case was, in effect, submitted on an agreed statement of facts and agreed conclusions as to the faults of the STAR, leaving as the only question at issue whether the STAR'S admitted faults contributed to the collision so as to justify holding her for one-half of the damages. Under these circumstances the findings and conclusions of the District Court are perhaps entitled to more than their usual weight.

STATEMENT OF THE CASE

The facts as found by the District Court (see Appendix A, page I hereof) are:

The collision occurred in the early morning of November 21, 1952 in the Mississippi River in the vicinity of Buras, Louisiana, below New Orleans, in a practically straight stretch of the river where same was 2,250 feet wide. The night was clear and dark and good for seeing lights.

The QUEENSTON was upbound; the STAR downbound. The pilot of the STAR, proceeding at full speed of about nine miles per hour, some 800 feet from the west bank sighted the lights of the QUEENSTON some 3 to 3½ miles distance and near the east bank — as customary in the Mississippi River the right descending bank is the west bank and the left descending bank is the east bank, regardless of compass direction — and at the same time observed her to turn slightly left and take a diagonal course which, if continued, would bring her to the opposite, or west bank of the river. This diagonal course, with some minor variation, was continued by the QUEENSTON up to the time of the collision. The STAR moved closer to the west bank and continued on at full speed, but blew no whistle. The STAR, observing that the QUEENSTON had crossed the middle line of the river and was continuing on her diagonal course, moved in to about 400 feet from the west bank, straightened up and continued on at full speed, but still blew no whistle. When the vessels were about 500 feet apart (about 15 seconds before collision) the STAR hearing a danger signal from the QUEENSTON answered with the danger signal and reversed her

engine. The collision occurred some 400 feet from the west bank, the stem of the QUEENSTON striking the port bow of the STAR.

Meanwhile the QUEENSTON, after undertaking her long diagonal course from the east to the west bank as mentioned, observed a white light and a dim red light beneath it of a vessel upstream which proved to be the STAR. Because of the relative positions of the two lights her pilot concluded that she was also bound upstream and that he was overtaking rather than meeting her and he blew a two-blast signal to pass to the left and reduced speed to half ahead. Receiving no answer the two-blast signal was repeated with still no answer, the QUEENSTON meanwhile continuing her diagonal course seeking to pass between the STAR and the west bank. It was then realized that the STAR was proceeding downstream and not upstream; the danger signal was blown and the engine put full astern. Collision followed within about 15 seconds.

The District Court condemned the QUEENSTON for her error in concluding that the white and red lights she saw were those of an upbound vessel, which could not have been so unless the STAR was showing improper lights; but the Court found that she, as well as the QUEENSTON, had proper lights. The passage which the QUEENSTON was attempting under her mistaken belief was of course improper, as the Inland Rules of Navigation (Art. 18, Rule 1) require vessels meeting head to head or nearly so to pass to the right or port to port of each other. No appeal was taken from the finding of fault on the QUEENSTON so that the only issue presented on appeal concerned the effect of the admitted faults of the STAR.

THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS WITH RESPECT TO THE STAR

The District Court found the STAR at fault in the following particulars and found that each fault either affirmatively contributed to the collision or had not been shown not to have so contributed:

(a) She blew no passing whistle at any time.

(b) She blew no danger signal until the vessels were "in the very jaws of collision."

(c) She continued on at full speed ahead until the vessels were 500 feet apart and likewise in the jaws of collision.

(d) She failed to hear the QUEENSTON'S repeated two-blast signals.

(e) Her lookout was improperly placed.

(f) Her whistle was faulty and unreliable.

Again we call attention to the fact that the STAR, appellant below, assigned no error to these findings of fault except as to their causal effect on the collision.

As part of the factual background for holding the STAR at fault — particularly as respects her neglect to blow a timely danger signal or to reduce speed until collision was unavoidable — the District Court said (R. 531):

> "For a considerable time before the collision, the navigators of the STAR saw and realized that the QUEENSTON was on an improper course for passing port to port as required by the Inland Rules. They mistakenly assumed, however, that the QUEENSTON would momentarily come to the right and prepare to pass port to port. As the QUEENSTON'S gradual diagonal course continued, they became more apprehensive and less certain as to her intentions. This apprehension and uncertainty was manifested by various actions and incidents such as repeated checking of the STAR'S lights, the pilot's comments to others concerning the course of the QUEENSTON, and the maneuvering of the STAR under hard right rudder for the purpose of displaying more vividly her red light to the oncoming QUEENSTON."

and (R. 536):

> "As a matter of fact, normal procedure would require that passing signals be exchanged between approaching vessels long before the necessity for a danger signal arises. Apparently, such a procedure never occurred to the navigators of the STAR. They seemed intent merely on keeping the STAR out of the way of the QUEENSTON by heading her for the west bank of the river, the same bank to which the QUEENSTON'S undeviating course was rapidly taking her."

and (R. 535):

> "The evidence is clear that her navigators were doubtful and apprehensive as to the intentions of the QUEENSTON. They assumed, and kept hoping, that the QUEENSTON would momentarily come to starboard so as to pass port to port, but there was nothing in the previous action of the QUEENSTON to justify such assumption or hope. The QUEENSTON'S diagonal course across the river, once undertaken, was not deviated from, and the STAR, completely without knowledge of the QUEENSTON'S intentions, continued on full speed ahead without sounding a signal of any kind until in the very jaws of collision. The danger signal, then sounded, came too late."

THE COURT OF APPEALS REVERSED THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT

(a) Passing Signal

The STAR admittedly blew no passing signals of any kind at any time and the District Court so found. Passing signals are required by Inland Rule, Art. 18, Rule I and Pilot Rule 80.3, (Appendix D, p. XVI) to be blown by both vessels when they are on courses to pass within a half mile of each other, and thus they are required when passing in the Mississippi River.

This was one of the primary faults of the STAR. It was a statutory fault, that is, a violation of the specific requirements of a mandatory statute. The cases so hold without dissent. The commission of this fault imposes liability unless it can be shown affirmatively that the failure did not contribute to the collision. Not only was there no evidence tending to establish this, but the District Court found:

> "This court is convinced that had the STAR sounded adequate passing signals and danger signals at appropriate times there would have been no collision."

The STAR'S failure to blow a passing whistle is especially important because the necessity for compliance with this rule is in no way dependent on the fault of the other vessel. Passing whistles are required to be blown even when the vessels are on courses safe for passing. It is unnecessary to say that the necessity is even greater when the course of the other vessel, as in this case, is such as to raise serious doubts as to her intentions.

Yet in the opinion of the Court of Appeals we find that there is not only no reason given for disagreeing with and overruling the District Court as to this primary fault of the STAR, a fault which fixes her with liability, but it is completely ignored and is not even mentioned or referred to directly or indirectly.

(b) Danger Signal

Inland Rule, Article 18, III provides:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall *immediately* signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." (Emphasis ours.)

This rule has been applied in a very large number of cases. It is strictly enforced and invariably where one vessel observes the other on a course or undertaking a maneuver which gives rise to danger of collision, and fails to act promptly, she has been held at fault notwithstanding the initial fault was that of the other vessel.

In the case of *THE CITY OF CHESTER*, 78 Fed. 186 (4th C.A.) the Court said:

> "Under such a state of facts, the BALTIMORE is clearly in fault. Her navigator was not surprised by any sudden indication that another craft, which he supposed intended to obey the rules, meant to violate them. On the contrary, with a very plain intimation that the other vessel was willfully or needlessly continuing on a course which made collision imminent, he kept on in the hope that at the last moment she would discover her error, and seek to rectify it. For thus keeping on un-

> til safety limit was reached and passed, the district judge held the navigator of the BALTIMORE in fault, and his decision is affirmed."

The District Court's comment on this point — including the most significant statement that if a timely danger signal had been blown there would have been no collision — has already been noted. That Court further stated:

> "The rule provides that it should be sounded whenever a vessel is in doubt as to the course or the intention of an approaching vessel. Inland Rules, Article 18. Its purpose is to resolve the doubt before the danger of collision arises, not after collision is inevitable."

Yet in the opinion of the Court of Appeals the only reference whatsoever to this finding of fault of the STAR is that "when collision became imminent, the STAR sounded the danger signal and reversed her engines, but to no avail." There is no discussion of the point whatever and no reasons given for disagreeing with the conclusions of the District Court.

(c) Failure to Reverse

As previously noted the District Court found that although the STAR for a considerable time before the collision was well aware that the QUEENSTON was on an improper course, she nevertheless continued on at full speed ahead "until in the very jaws of collision." As a matter of fact, the STAR'S engineer on watch testified

(R. 226) that the order to reverse and the collision were "almost instantaneous." For this the District Court condemned her.

The Court of Appeals made no reference to this fault except as above noted. Again there was no discussion and no reasons given for disagreeing with the conclusions of the District Court.

(d) Failure to hear the Repeated Signals of the QUEENSTON

The District Court found that the QUEENSTON twice sounded a two-blast signal to indicate her intention of passing to the left. It was after this repeated signal that her pilot realized the STAR was downbound, whereupon she sounded the danger signal. The District Court found the STAR at fault for not hearing these prior signals.

The Court of Appeals made no reference whatever to this fault; there was no discussion and no reasons given for reversing the District Court.

(e) Improper Lookout

The District Court found the STAR at fault for having placed her lookout on the bridge rather than on the bow where the noise of her Diesel engines would not have interfered with hearing the signals of the QUEENSTON.

A reading of the opinion of the District Court clearly justifies the comment not only that this fault was by no means the most serious one, but that it was not so regarded by that Court. Had this fault stood alone the District Court might well have considered, just as the Court of Appeals did, that it was insufficient to cast liability on the STAR.

Nevertheless this relatively minor fault is the only one discussed by the Court of Appeals and as to which reasons were given for reversing the District Court. This reversal of the District Court is not urged in support of this application; it is mentioned only so that the matters dealt with by the Court of Appeals be completely stated.

(f) Faulty Whistle

The pilot of the STAR had testified (R. 501) that prior to meeting the QUEENSTON he had occasion to use the STAR'S whistle but found that it sounded "so very faint" that when he was approaching the QUEENSTON he thought that even if he had attempted to blow signals to her they could not have been heard.

The District Court found (R. 531):

> "The pilot of the STAR was apprehensive, too, about the STAR'S whistle having found from a prior use that it was very faint, and he thought, as he saw the QUEENSTON on her improper course, that even if blown, it would not have been heard."

and (R. 536):

> "Perhaps as her pilot suggests, the STAR'S failure to sound signals did result from lack of confidence in their being heard, but that fact would magnify rather than mollify her fault. Unfortunately, however, there seems no other rational explanation why the whistle was not used."

It seems quite obvious that a vessel whose whistle sounds so very faint that her pilot does not use it when its use is imperative has the equivalent of no whistle at all.

Yet, we search in vain in the opinion of the Court of Appeals for any mention whatever of the STAR'S whistle or of the District Court's holding on this point.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The decision of the Court of Appeals is violative of the holding of this Court in *McAllister v. United States*, ____ U.S. ____, 99 L. Ed. (adv. p. 13), in which this Court said:

> "The first question presented is whether the Court of Appeals in reviewing the District Court's findings applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they

exercise under Rule 52 (a) of the Federal Rules of Civil Procedure. Boston Ins. Co. v. Dehydrating Process Co. 204 F 2d 441, 44 (CA 1st Cir.); C. J. Dick Towing Co. v. The Leo, 202 F 2d 850, 854 (CA 5th Cir.); Union Carbide & Carbon Corp. v. United States, 200 F 2d 908, 910 (CA 2d Cir.); Koehler v. United States, 187 F 2d 933, 936 (CA 7th Cir.); Walter G. Houghland, Inc. v. Muscovalley, 184 F 2d 530, 531 (CA 6th Cir.), cert den 340 US 935, 95 L Ed. 675, 71 S. Ct. 490; Petterson Lighterage & Towing Corp. v. New York Cent. R. Co. 126 F 2d 992, 994, 995 (CA 2d Cir.). A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed; United States v. Oregon State Medical Soc. 343 US 326, 339, 96 L Ed. 978, 988, 72 S. Ct. 690; United States v. United States Gypsum Co. 333 US 364, 395, 92 L. Ed. 746, 765, 68 S. Ct. 525. We do not find that the Court of Appeals departed from this standard, although we do disagree with the result reached under the application of the standard. In relation to the District Court's findings we stand in review in the same position as the Court of Appeals. The question, therefore, is whether the findings of the District Court are clearly erroneous."

In the present case it will be seen that not only were the findings of the District Court not "clearly erroneous" but they were in fact correct and supported by the evidence. This is particularly true in view of the fact that the Dis-

trict Court heard in person the principal witness of the STAR, her pilot, and after hearing him in person found the facts as set forth in its opinion.

2. The action of the Court of Appeals in reversing the District Court was further violative of the principles of the McAllister case, and the cases on which it is based, in that any normal standard of judicial procedure would require that a reviewing court, finding itself in disagreement with the findings and conclusions of the District Court to such an extent as to reverse them as "clearly erroneous," would properly review them and, however briefly, give the reasons for the reversal and the setting aside of the findings and decree. It is obvious that no such standard has been observed in this case, as can be seen from the two opinions themselves. Except for the review of the matter of the placement of the STAR'S lookout, — and this was the only conclusion which the Court of Appeals held to be "clearly erroneous," — the Court of Appeals did not review, discuss, give any reasons for disagreement or even so much as mention the other obvious and admitted faults of the STAR: the failure to blow any signal, either passing or danger, except the danger signal when the vessels were in the very jaws of collision; continuing at full speed until in the very jaws of collision; having a faulty and unreliable whistle; and failing to hear the QUEENSTON'S repeated two-blast signals.

The passing reference in the opinion of the Court of Appeals to other "technical" or "minor" faults — without identifying them, without discussing them and without giving reasons for disagreement —is entirely out of place so far as the STAR'S navigation is concerned. The acts of

the STAR were in actual disregard of mandatory statutes, the very purpose of which is to avoid confusing situations likely to lead to collision, and had those violations of statute not been committed in this case, collision would not have occurred. In the language of the District Court, plainly put, but completely disregarded by the Court of Appeals:

> "This Court is convinced that had the STAR sounded adequate passing signals and danger signals at appropriate times, there would have been no collision."

The Court of Appeals, apparently unable to explain how such direct violations of statutes could be "technical" or "minor," resolved their difficulty by the convenient method of ignoring the plain facts as found by the District Court.

These navigation rules are not technical or unimportant, but on their strict and complete observance depends the safety of vessels and passengers and crew. The rule requiring the blowing of passing whistles is vitally necessary to assure the vessels reaching a timely agreement on the manner of passing. Had the STAR blown, or had she a whistle capable of blowing, passing signals in this case, there would have been no collision, and the District Court so found; but the Court of Appeals has held in effect that this statute may be violated with impunity.

The rule requiring a vessel to blow the danger signal and to slow or stop *immediately* upon doubt arising as to the course or intention of the other vessel, is vitally necessary to

prevent a vessel from continuing to proceed into a situation of obvious danger, and compliance with the rule is equally necessary and equally mandatory whether or not she had herself brought about the situation of danger. Here, although well aware for a very considerable time that the QUEENSTON was on a course which would lead to collision, the STAR disregarded the rule, did not blow a danger signal, and did not slow and did not stop, but kept on at full speed ahead without sounding any whistle of any kind until the vessels were "in the very jaws of collision." These are not "technical" or "minor" faults, but the Court of Appeals has held, by its reversal and by its failure to give a proper consideration to them, that this rule may be violated with impunity.

3. The decision of the Court of Appeals is contrary to this Court in its decision of *The Pennsylvania,* 86 U.S. 125, by which this Court put upon a vessel which has violated the specific rules of navigation, as did the STAR here, the burden of proving that the violations did not contribute to the collision. In the present case not only did the STAR fail to show that her admitted faults did not contribute to the collision, but the QUEENSTON affirmatively showed that they did contribute; the District Court unequivocally and in so many words so found as a fact; and the Court of Appeals, in its opinion, did not suggest a single fact or circumstance tending to show that the STAR'S admitted statutory faults did not contribute.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

May 20, 1955

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CERTIFICATE

I certify that copies of the foregoing petition have been served on opposing counsel of record by placing the same properly addressed in the United States mail with adequate postage affixed thereto.

May 20, 1955 _____

APPENDIX A
FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT

WRIGHT, District Judge:

At about 1:30 A.M. on November 21, 1952, the motor vessel, STAR OF HONDURAS, downbound, and the tanker steamship, QUEENSTON HEIGHTS, upbound, met in collision in the Mississippi River off the town of Buras, Louisiana, at about Milepost 26, a few hundred feet from the west or right-descending bank. The night was dark and clear, making conditions excellent for seeing lights and hearing signals.

The STAR OF HONDURAS was a wartime, steel LCI, converted to a cargo vessel, length 152.3 feet, beam 23.3 feet, powered by two 150-horsepower Diesel engines. She was fully ladened with lumber and general cargo and was being navigated at the time by a Mississippi River pilot, with her master, a helmsman, and a lookout on the bridge. There was no lookout on the bow.

The QUEENSTON HEIGHTS was a T-2 tanker in ballast, 504 feet in length, with a beam 68.2 feet. She was being navigated by a Mississippi River pilot, with her master in the chartroom, watch officer and helmsman on the bridge, and a lookout on the bow. She was in all respects seaworthy and displaying proper lights. When the vessels came in sight of each other both were proceeding at full speed ahead, the STAR making good about 9 miles per hour over the ground and the QUEENSTON about 15 miles per hour over the ground.

Between Bolivar Light at Milepost 22 and Tropical Bend at Milepost 30 the Mississippi River is practically straight, about 2,250 feet wide, and runs generally north and south. The Alberta Light is on the west bank (M.A.H.P. 27.8) and Neptune Light (M.A.H.P. 23.9) on the east bank. Above Neptune Light there is an oil dock on the east bank at Ostrica, Louisiana (M.A.H.P. 25.7).

When in the vicinity of Alberta Light and proceeding parallel to and about 800 feet from the west bank of the river, the pilot and other deck personnel on the bridge of the STAR observed the red, green, and range lights of a steamer, which later proved to be the QUEENSTON, then in the vicinity of Neptune Light, near the east bank and some 3 to 3½ miles distant. At this time the QUEENSTON was observed by the STAR to turn slightly left and take a diagonal course which, if continued, would bring her to the opposite, or west bank, of the river. This diagonal course, with some minor variation, was continued by the QUEENSTON up to the time of the collision.

Assuming that the diagonal course then being taken by the oncoming vessel was for the purpose of lessening wave wash and thus preventing damage to vessels moored to the oil dock at Ostrica and in order to provide ample room for that maneuver, the STAR, on an easy right rudder, brought herself to about 600 feet from the west bank and thereupon straightened up and continued on. On observing that the QUEENSTON had crossed the middle line of the river and was still continuing her course diagonally toward the west bank, the STAR, under a hard right rudder, brought herself to about 400 feet from the west bank, straightened up, and continued on at full speed ahead

as before. The QUEENSTON, however, continued on her diagonal course without change of bearing from the STAR until the vessels were little more than 500 feet apart. Thereupon, on hearing what the STAR'S witnesses say was a two-blast signal from the QUEENSTON, but which, in fact, was probably a danger signal, the STAR sounded her own danger signal and reversed her engines on the hard right rudder. The collision occurred in less than a minute.

At the time the STAR'S danger signal was sounded, the ship's internal alarm was likewise sounded and, on the pilot's suggestion, the Captain ordered all men above deck to await the collision. During the time the vessels were in sight of each other the STAR sounded only the danger signal, and that immediately before the collision, in spite of the fact that the QUEENSTON was constantly under the observation of the navigators of the STAR and her gradual diagonal course and heading were at all times known to them.

The QUEENSTON, in the meantime, while in the vicinity of Neptune Light, as the navigators of the STAR had assumed, had angled out from the east bank toward the middle of the river to give clearance to the oil dock at Ostrica. When in about the middle of the river approaching abreast of the oil dock, she slowed to half speed ahead, which change from full ahead was recorded on the bridge and in the engine room as of 1:26 A.M. At about this time her navigators observed the white and red lights of a vessel upstream, which later proved to be the STAR, favoring the west bank of the river. It was concluded by the pilot on the QUEENSTON that the lights observed were those of a tug pushing barges upstream rather than the lights of a vessel moving

downstream. Proceeding under this mistaken belief, the QUEENSTON sounded a two-blast overtaking signal, and the helm was put easy left, the helm movement being recorded as of 1:27 A.M. After waiting at least thirty seconds for an answering signal, the two-blast signal was repeated. It was after the second two-blast signal that the QUEENSTON realized that the vessel observed was not a tug pushing a tow upstream but was, in fact, a vessel coming downstream. This realization may have come from the danger signal of the STAR, which the QUEENSTON denies hearing, or from the proximity of the vessel, now not much more than 500 feet away. In any event, after realizing her mistake, the QUEENSTON sounded the danger signal and reversed her engines under a hard left rudder. The backing of the engine was recorded by the QUEENSTON at 1:28 A.M., and the collision itself at 1:28½ A.M. The stem of the QUEENSTON struck the port bow of the STAR about 6 feet abaft her stem.

For a considerable time before the collision, the navigators of the STAR saw and realized that the QUEENSTON was on an improper course for passing port to port as required by the Inland Rules. They mistakenly assumed, however, that the QUEENSTON would momentarily come to the right and prepare to pass port to port. As the QUEENSTON'S gradual diagonal course continued, they became more apprehensive and less certain as to her intentions. This apprehension and uncertainty was manifested by various actions and incidents such as repeated checking of the STAR'S lights, the pilot's comments to others concerning the course of the QUEENSTON, and the maneuvering of the STAR under hard right rudder for the purpose of displaying more vividly her red lights to the on-

coming QUEENSTON. The pilot of the STAR was apprehensive, too, about the STAR'S whistle, having found from a prior use that it was very faint, and he thought, as he saw the QUEENSTON on her improper course, that even if blown, it would not have been heard.

It must be owned, as counsel for respondent impliedly does, that the actions of the QUEENSTON HEIGHTS leading to the collision are indefensible. Why a navigator in his right mind would assume, on seeing the red and white lights of a vessel favoring the west or right-descending bank of the Mississippi River, that she was a western river towboat pushing a tow ahead upriver with one of her red stern pushing lights burned out is inexplicable. Moreover, the vessels were closing on each other with a combined speed up to 25 miles an hour. Observation of this fact alone should have been sufficient to wake the navigators of the QUEENSTON from their dream of a western river towboat going upstream. Certainly, a casual check of the relative bearings of the two vessels, which bearings never changed from the time the vessels first came in sight of each other, would have indicated to the merest tyro that the vessels were on collision courses. Respondent suggests that the failure of the navigators of the QUEENSTON properly to appraise the situation was a mistake of judgment rather than negligence. Assuming, but not agreeing that it was, it was a mistake of judgment which should never have been made by men charged with the navigation of a T-2 tanker at night in the Mississippi River. It was a mistake of judgment which bore on their competence as navigators. It was a mistake of judgment which demonstrates the unseaworthiness, and the fault, of a vessel so manned. *Chamberlain et al* v. *Ward et al*, 62 U.S. 548.

In addition, the QUEENSTON was guilty of statutory faults which directly contributed to the collision. After receiving no reply to her two-blast overtaking signal, the QUEENSTON nevertheless proceeded to undertake the maneuver by applying more left rudder and maintaining her speed. This, of course, is a violation of Article 18 of the Inland Rules. Even after her second two-blast signal went unanswered, the QUEENSTON continued merrily on her way endeavoring to overtake this phantom western river towboat with one of her red stern pushing lights burned out going upstream. And to complete the travesty, the QUEENSTON finally rammed into the port bow of the STAR without reversing her propellor.[1] If the QUEENSTON had stopped and reversed when her signals went unanswered and not proceeded to undertake any maneuver with respect to the STAR until an agreement between the vessels had been reached, as she was required to do, there would, of course, have been no collision. Her failure in this regard condemns her. *The New York*, 175 U.S. 187.

The question as to the fault of the STAR is a more difficult one. The principle is well established that where one vessel, clearly shown to have been guilty of fault adequate in itself to account for the collision, seeks to impugn the management of other vessels, there is a presumption in favor of the latter which can only be rebutted by clear proof of contributive fault. *The City of New York*, 147 U.S. 72, 86; *The Oregon*, 158 U.S. 186, 197; *The Umbria*, 166 U.S. 404; *The Victory*, 168 U.S. 410, 423. On the other hand, it is likewise clear that initial fault of one vessel does

[1] At the time of the collision the propellor had not begun to reverse, the full astern order having been given only 30 seconds before the collision.

not exempt the other from the duty of complying with the rules of navigation or of using such precautions as good judgment and seamanship require to meet the emergency. *The Maria Martin*, 79 U.S. 31, 47; *The Sunnyside*, 91 U.S. 208, 215; *The New York*, supra. Applying these principles to the case of the STAR, and resisting the understandable temptation to fix fault wholly on the vessel guilty of initial and grevious fault in creating the danger of collision, this Court finds the STAR also guilty of fault contributing to the collision.

It is admitted that the lookout of the STAR was not in the bow of the vessel as he was required to be. *The Ottawa*, 70 U.S. 268; *The Ariadne*, 80 U.S. 475; *British Col. Mills Tug & Barge Co.* v. *Mylroie*, 259 U.S. 1; *Chamberlain et al* v. *Ward et al*, supra; *The Yoshida Maru*, 20 F. 2d 29 (CA 9). It is true that the bow of this vessel near the stem is probably no more than 50 feet from the pilot house and that persons in the pilot house can see lights as well as a lookout in the bow. Nevertheless, the evidence shows that the overtaking signals sounded by the QUEENSTON were not heard by the STAR. It is possible that a lookout 50 feet forward of the men in the pilothouse, and that much farther removed from the noise of the vessel's Diesel engines, may have picked up these signals. If the STAR had known of the QUEENSTON'S two-blast signal at 1:27 A.M. when it was first sounded, by appropriate action she may have avoided the collision. At least, since it has not been demonstrated that her failure to have a proper lookout could not have contributed to the collision, she could be condemned on this fault alone. *The Pennsylvania*, 86 U.S. 125; Inland Rules, Article 29.

The fault of the STAR, however, is not confined to having an improper lookout. The evidence is clear that her navigators were doubtful and apprehensive at to the intentions of the QUEENSTON. They assumed, and kept hoping, that the QUEENSTON would momentarily come to starboard so as to pass port to port, but there was nothing in the previous action of the QUEENSTON to justify such assumption or hope. The QUEENSTON'S diagonal course across the river, once undertaken, was not deviated from, and the STAR, completely without knowledge of the QUEENSTON'S intentions, continued on full speed ahead without sounding a signal of any kind until in the very jaws of collision. The danger signal, then sounded, came too late. The pilot of the STAR knew it was too late, because, at the same time the signal was sounded, the crew was ordered to stand by topside to await the collision.

The danger signal is not intended as a substitute for an order to prepare to abandon ship. The rule provides that it should be sounded whenever a vessel is in doubt as to the course of the intention of an approaching vessel. Inland Rules, Article 18. Its purpose is to resolve the doubt before the danger of collision arises, not after collision is inevitable.

As a matter of fact, normal procedure would require that passing signals be exchanged between approaching vessels long before the necessity for a danger signal arises.[a] Apparently, such a procedure never occurred to the navigators of the STAR. They seemed intent merely on keeping the STAR out of the way of the QUEENSTON by heading

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[a]Inland Rules, Article 18.

her for the west bank of the river, the same bank to which the QUEENSTON'S undeviating course was rapidly taking her. Perhaps, as her pilot suggests, the STAR'S failure to sound signals did result from lack of confidence in their being heard, but that fact would magnify rather than mollify her fault. Unfortunately, however, there seems no other rational explanation why the whistle was not used.

This court is convinced that had the STAR sounded adequate passing signals and danger signals at appropriate times there would have been no collision. In any event, it has not been demonstrated that these statutory faults on her part could not have contributed to the collision. *The Pennsylvania*, supra.

Both to blame. Decree accordingly.

APPENDIX B

STAR'S ASSIGNMENTS OF ERROR ON APPEAL

1 — The Court erred in holding that the fact that the lookout of the M/V STAR OF HONDURAS was stationed on the wing of her bridge rather than at her bow, could have contributed to the collision at issue.

2 — The Court erred in holding that the fact that the M/V STAR OF HONDURAS sounded no passing signal prior to collision, and did not sound the danger signal until the T/S QUEENSTON HEIGHTS had closed to within about 500 feet, could have contributed to the collision.

3 — Alternatively, the Court erred in failing to hold that any faults of omission on the part of the M/V STAR OF HONDURAS contributed so little to the collision, as compared with the flagrant and multiple active faults of the T/S QUEENSTON HEIGHTS, that ultimate full responsibilty for the collision should rest with the T/S QUEENSTON HEIGHTS.

4 — Alternatively, the Court erred in dividing damages equally between the M/V STAR OF HONDURAS and T/S QUEENSTON HEIGHTS, instead of apportioning the damages between the vessels according to the relative degree of their faults.

APPENDIX C

OPINION OF THE COURT OF APPEALS
(March 17, 1955.)

Before HUTCHESON, Chief Judge, HOLMES, Circuit Judge, and DAWKINS, District Judge.

HOLMES, Circuit Judge: This is a suit in admiralty for damages resulting from the collision of two vessels in the Mississippi River. On November 21, 1952, the tanker Queenston Heights, while ascending the river below New Orleans, struck and sank the motor vessel Star of Honduras. Action was brought by the owner of the Star against the Queenston, wherein the court below entered an interlocutory decree dividing the damages equally between the two vessels. 121 Fed. Supp. 280. The owner of the Star prosecutes this appeal. The primary question is whether or not the rule of equal division of damages should be applied to the facts in this case.

On the night above mentioned, the Star, a wartime steel LCI converted to a cargo vessel of 198 tons net, was proceeding south in the Mississippi River. She was fully laden with lumber and general cargo, and was being navigated by a Mississippi-River Pilot; her master and a lookout were on the bridge. There was no lookout on the bow. All of the vessel's running lights were properly displayed and were burning brightly. The Queenston, a T-2 tanker of 6301 net tons, was proceeding north along the east bank of the river. She was being navigated by a Mississippi-River Pilot; her master was in the chartroom, her watch

officer and helmsman were on the bridge, and a lookout was on the bow. She was also displaying the proper lights.

Shortly after 1:00 A. M. on the same night, the Star reached Alberta Light, a green light on the west or right descending bank of the river, about 68 miles below New Orleans, in the reach between Tropical Bend and Bolivar Point. She was laying a course approximately 800 feet off and parallel to the west bank, and was making about nine miles per hour. When the Star was a short distance below Alberta Light, the pilot and other deck personnel sighted, two or three miles downstream, the red, green, and range lights of an up-bound vessel, which later proved to be the Queenston. The Star's running lights were rechecked at this time, and were found to be burning brightly. The Star observed the Queenston to bear slightly to the left and take a diagonal course, which, if continued, would bring her to the west bank of the river. This diagonal course was continued by the Queenston up to the time of the collision.

Those aboard the Star correctly assumed that this maneuver was for the purpose of minimizing wave wash and damage to the vessels moored at an oil dock, which the Queenston was passing. In order to provide ample room for that maneuver, the Star, on an easy right rudder, moved about 200 feet closer to the west bank, straightened up, and continued southward. On observing that the Queenston had crossed the middle line of the river and was still continuing her diagonal course toward the west bank, the Star, under a hard right rudder, brought herself to about 400 feet from the west bank, straightened up, and continued at full speed. The Queenston, however, con-

tinued on her diagonal course without change or bearing at a speed of 15 miles per hour until the vessels were within 500 feet of each other. Thereupon, hearing a two-blast signal from the Queenston, a signal requesting a starboard-to-starboard passing, the Star, realizing that such a passing could not be negotiated, gave a four-blast danger signal, and reversed her engines on a hard right rudder. In less than a minute the Queenston rammed into the port bow of the Star without reversing her propellor, although she had reversed her engines a short time before the collision. The Star was beached, but subsequently sank, and was a total loss.

The trial court found many violations on the part of the Queenston amounting to gross negligence, which contributed to the collision, and its findings in that respect are not questioned by either party to this appeal. However, it found that the Star was also guilty of certain violations, and applied the rule of equal division of damages. The Pennsylvania, 86 U.S. 125.

We agree with the district court that the actions of the Queenston leading to the collision are indefensible. The Queenston was guilty of gross negligence in proceeding at an excessive speed when she knew, or should have known, that the Star was a downbound vessel in a meeting situation; in the failure of her lookout to report the lights of the Star when sighted; in the failure of her pilot to recognize that the Star was downbound, as evidenced by the latter's proper navigation lights, which were seen by the pilot; in failing to keep to her right side of the channel; in altering her course before receiving a reply to her passing signal; in attempting to effect a star-

board-to-starboard passing contrary to the Inland Rules; in failing to heed the Star's danger signal; and in failing to stop and reverse engines when her pilot became uncertain as to what the navigation lights of the Star indicated but was aware of their constant bearing for more than six minutes.

From the undisputed testimony, we are of the opinion that the failure to have a lookout on the bow of the Star did not actively contribute to the cause of the collision. The finding to the contrary by the court below was clearly erroneous. The only relation to the collision of the position of the Star's lookout is speculation that, had the lookout been in the bow, he might have heard a prior two-blast signal, which the Queenston claims to have sounded one-half minute before the two-blast signal that the Star did hear, which prompted the Star's danger signal; and that, if such a prior signal had been heard, the Star might have been able to take some action to avoid the collision. It is difficult to perceive what action the Star could have taken to avert the collision in view of the action on the part of the Queenston. We are in accord with the statement of the First Circuit, in *Seaboard Tug & Barge v. Rederi* AB/DISA, 213 F. (2) 772, that the Supreme Court, in The Pennsylvania, 86 U. S. 125, did not intend to establish a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision, no matter how speculative, improbable, or remote.

Even if the actions of the Star be considered as casting some minor fault on her, it does not follow that the Star must be condemned to pay half of the resulting damages.

The Star did nothing which actively contributed to the collision. She was navigating under proper lights in the part of the river where she was required to be. Twice the STAR pulled closer to the west bank, thereby leaving practically the whole reach of the river fo rnavigation by the Queenston. When collision became imminent, the Star sounded the danger signal and reversed her engines, but to no avail. The Star had every right to assume that the larger vessel would observe the Inland Rules and act within the law. The Delaware, 161 U. S. 459; The Victory, 168 U. S. 410.

Where the gross negligence of one vessel is wholly sufficient in itself to account for the collision, but the other vessel has committed a technical fault not shown to have contributed to the collision, and where the error of the latter is minor, doubt as to the latter's conduct will be resolved in her favor. Griffin on Collisions, p. 505. Furthermore, where the active fault of one vessel so flagrantly and heavily outweighs the passive faults of omission of the other vessel, the interests of justice are best served by condemning the more culpable vessel completely. The Great Republic, 90 U. S. 20; The Lord O'Neil, 66 Fed. 77.

The facts in this case require the application of the rule announced in the just-cited cases. The Queenston was guilty of flagrantly active wrongs, and the chief blame was on her, while at most there was only some venial fault on the part of the Star, which fault bears so little proportion to the many faults of the Queenston that the Star should not share the consequences of this collision. Accordingly, the judgment appealed from is modified and affirmed. *Socony-Vacuum Oil Co. v. Smith*, 179 F. (2) 672; *Harris v. Sabine Transp. Co.*, 202 F. (2) 537.

MODIFIED and AFFIRMED.

APPENDIX D

SELECTED PROVISIONS OF THE INLAND RULES OF NAVIGATION (33 U.S.C. 151, et seq.) AND PILOT RULES FOR INLAND NAVIGATION

"ART. 18. RULE I. When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other . . . "

PILOT RULE 80.3: "The signals for passing, by the blowing of the whistle, shall be given and answered by pilots, in compliance with the rules in this part, not only when meeting 'head and head,' or nearly so, but at all times when the steam vessels are in sight of each other, when passing or meeting at a distance within half a mile of each other, and whether passing to the starboard or port . . . "

"ART. 18. RULE III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the

vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."